PP v. PROLIFIC YIELD SDN BHD

HIGH COURT SABAH & SARAWAK, SANDAKAN
CELESTINA STUEL GALID J
[CRIMINAL CASE NO: SDK-42S-1-2-2020]
15 FEBRUARY 2021

CRIMINAL PROCEDURE: *Appeal – Appeal against sentence by Sessions Court – Offence under s. 16(1) of Environmental Quality Act 1974 – Imprisonment term in default of fines against corporate entity – Whether illegal – Whether charge preferred only against company and not officers of company – Whether there was legal basis for default imprisonment in event fines not paid – Whether previous convictions for same offences taken into consideration – Whether company taken steps to rehabilitate itself since last conviction – Whether guilty plea automatically gives rise to discount in sentence – Whether environmental issues especially pollutions and its negative effects to be taken seriously – Whether court must have regard to objective of statutory provision – Whether sentence ought to reflect seriousness of offence*

The respondent was a company involved in the business of 'milling and sale of oil palm products' and held a licence issued pursuant to s. 18(1) of the Environmental Quality Act 1974 ('Act') by the Department of Environment of Sabah. At the Sessions Court ('SC'), the respondent pleaded guilty to two charges under s. 16(1) of the Act and was thus convicted and sentenced to (i) a fine of RM13,000 in default of five months imprisonment for the first charge; and (ii) a fine of RM15,000 in default of six months imprisonment for the second charge. Dissatisfied, the prosecution appealed against the sentences on the grounds that: (i) the imprisonment term in default of the fines ordered by the Sessions Court was illegal; (ii) the SC did not consider the respondent's previous conviction; and (iii) the SC did not consider public interest in sentencing the respondent. The Deputy Public Prosecutor submitted, *inter alia*, that the imprisonment term in default of the fines imposed by the SC was contrary to law as the respondent was a corporate entity.

Held (allowing appeal; varying sentence):

(1) The charges were clearly preferred against the respondent company only. None of the officers of the respondent was charged pursuant to s. 43 of the Act. The representative of the respondent who appeared before the SC and pleaded guilty to the charges on behalf of the respondent was not jointly charged for the offences. There would not have been any legal basis for the default imprisonment sentence to be carried out in the event the fines were not paid by the respondent. As such, the SC erred when it purported to impose the default sentence. (paras 14 & 15)

(2) Out of the respondent's six previous convictions, five of them were all under s. 16(1) of the Act, the same of which the current charges were framed. The determinative factor in treating a person with previous convictions as a man of previous good character was not so much the time that has lapsed since the last conviction, but the positive steps that he had taken to rehabilitate himself (*Soosainathan v. PP*). There was no evidence that the respondent had taken any steps after its last conviction in 2016 to avoid committing the same offences again. (paras 21-23)

(3) While the public interest factor was briefly noted by the SC, there was nothing much said about how the sentences imposed would serve public interest. Further, the SC had placed more weight on the effect of the respondent's guilty plea to saving the court's time and the expense of full trial. In considering whether public interest is served by the sentence to be imposed, the court cannot but must have regard to the objective of the relevant statutory provision. The respondent's guilty plea did not automatically entitle the respondent to a discount. In all of the other six previous convictions, the respondent had pleaded guilty and, except for the conviction in 2016, the respondent received discounts in the sentences imposed. The fact that it was only after the present convictions that the respondent had purportedly taken the steps to upgrade its system showed that the company hesitated to take matters seriously as to do so involved having to expend millions of ringgits. There was no reason why the upgrade could not have been done earlier. (paras 25, 27, 32 & 33)

(4) It was grossly an affront to public interest if corporations such as the respondent were allowed to flaunt and disregard the social costs caused by the pollutions only to ensure maximum profits for themselves. It was high time for all stakeholders to take environmental issues seriously. Pollutions, howsoever caused, not only has a negative effect on the planet but also on the people and society as a whole. As one of these stakeholders, the court was under a duty to ensure that the seriousness of the offence and its effect be reflected in the sentence it imposes. In the circumstances and in the exercise of the court's powers under s. 316 of the Criminal Procedure Code, the appeal was allowed and sentence was varied as follows: (i) for the first charge, the fine of RM13,000 was varied to the sum of RM25,000 and default sentence of five months imprisonment was vacated; and (ii) for the second charge, the fine of RM15,000 was varied to the sum of RM25,000 and the default sentence of six months imprisonment was vacated. (paras 30, 31 & 38)

Case(s) referred to:
Amir Hassan Ali Usin v. PP [2019] 3 CLJ 325 CA ***(refd)***
Dunlop Malaysian Industries Bhd v. PP [1984] 1 LNS 126 HC ***(refd)***
Edward Goh Geok Seng v. PP [1996] 1 BLJ 45 HC ***(refd)***
Gek Sing Kaliappan v. PP [1999] 4 CLJ 292 HC ***(refd)***
New Tuck Shen v. PP [1982] CLJ 38B; [1982] CLJ (Rep) 606 HC ***(refd)***
PP v. Jafa Daud [1981] 1 LNS 28 HC ***(refd)***
PP v. Kasihku Sdn Bhd [1991] 2 CLJ 1192; [1991] 3 CLJ (Rep) 572 HC ***(refd)***
PP v. Ng Chong Wan [1988] CLJ 833; [1988] 2 CLJ (Rep) 278 HC ***(refd)***
R v. Kenneth John Ball (1951) 35 Cr App R 164 ***(refd)***
Soosainathan v. PP [2001] 6 CLJ 44 HC ***(refd)***
The Coastal Bus Co Ltd v. PP [1962] 1 LNS 199 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 316(b)
Environmental Quality Act 1974, ss. 16(1), 18(1), 25(1), 43
Subordinate Courts Act 1948, s. 99A, Third Schedule para 20

For the prosecution - Mark Kenneth Netto; DPP
For the respondent - Rowiena Rasid; M/s Rowiena Rasid & Co

[Editor's note: Appeal from Sessions Court, Sandakan; Criminal Case No: SDK-63ES-1-1-2020 (overruled).]

Reported by S Barathi

JUDGMENT

Celestina Stuel Galid J:

Introduction

[1] The respondent is a private limited company and having a business address at KM 63, Jalan Lahad Datu-Sandakan, Sungai Segaliud, 90000 Sandakan, Sabah. Its nature of business is "milling and sale of oil palm products".

[2] The respondent is a holder of a licence no. 003448 issued pursuant to s. 18(1) of the Environmental Quality Act 1974 ("the Act") by the Department of Environment of Sabah for the period from 1 July 2018 to 30 June 2019.

[3] The respondent was charged with and through its Group General Manager, one Mr. Chan Kai Man, pleaded guilty to the following two charges:

Pertuduhan pertama

Bahawa kamu, pada 14 Februari 2019, lebih kurang jam 10.00 pagi hingga 12.00 tengah hari, bertempat di premis Prolific Yield Sdn. Bhd. (No. Syarikat: 354781-H), CL 075359634, Segaliud/Lokan, di dalam daerah Sandakan, di dalam Negeri Sabah, sebagai pemegang lesen

bernombor 003448 yang dikeluarkan oleh Jabatan Alam Sekitar Negeri Sabah bagi menduduki atau menggunakan permis yang ditetapkan di bawah Seksyen 18(1), Akta Kualiti Alam Sekeliling, 1974 untuk tempoh 1 Julai 2018 hingga 30 Jun 2019, didapati telah melanggar syarat no. 4(i), syarat-syarat dalam Jadual pematuhan lesen bernombor 003448 iaitu telah melepaskan efluen ke pengairan tanah yang mempunyai kepekatan Oksigen Biokimia Yang Diperlukan (BOD, 3 hari, 30°C) sebanyak 59mg/l, melebihi had pelepasan efluen ke pengairan tanah yang ditetapkan iaitu 20mg/l.

Oleh yang demikian, kamu telah melakukan satu kesalahan di bawah Seksyen 16(1) Akta Kualiti Alam Sekeliling 1974 dan boleh dihukum dibawah Seksyen 16(1) Akta yang sama.

Pertuduhan kedua

Bahawa kamu, pada 14 Februari 2019, lebih kurang jam 10.00 pagi hingga 12.00 tengah hari, bertempat di premis Prolific Yield Sdn. Bhd. (No. Syarikat: 354781-H), CL 075359634, Segaliud/Lokan, di dalam daerah Sandakan, di dalam Negeri Sabah, sebagai pemegang lesen bernombor 003448 yang dikeluarkan oleh Jabatan Alam Sekitar Negeri Sabah bagi menduduki atau menggunakan permis yang ditetapkan di bawah Seksyen 18(1), Akta Kualiti Alam Sekeliling, 1974 untuk tempoh 1 Julai 2018 hingga 30 Jun 2019, didapati telah melanggar syarat no. 4(ii), syarat-syarat dalam Jadual pematuhan lesen bernombor 003448 iaitu telah melepaskan efluen ke pengairan tanah yang mempunyai kepekatan Pepejal Terampai sebanyak 310mg/l, melebihi had pelepasan efluen ke pengairan tanah yang ditetapkan iaitu 200mg/l.

Oleh yang demikian, kamu telah melakukan satu kesalahan di bawah Seksyen 16(1) Akta Kualiti Alam Sekeliling 1974 dan boleh dihukum dibawah Seksyen 16(1) Akta yang sama.

[4] On 5 February 2020, the Sessions Court accepted the guilty plea and convicted the respondent of the two charges and imposed the following sentences:

1st charge:

A fine of RM13,000.00 in default of 5 months imprisonment

2nd charge:

A fine of RM15,000.00 in default of 6 months imprisonment

[5] Being dissatisfied, the prosecution appealed to this court against the said sentences.

[6] This court heard the appeal on 15 January 2021 but due to the Covid-19 pandemic, the delivery of the decision was adjourned to this date, 15 February 2021 to enable the physical presence of the representative from the respondent company.

The Grounds Of Appeal

[7] The prosecution had premised their appeal on the following grounds:

(i) the imprisonment term in default of the fines ordered by the Sessions Court was illegal;

(ii) the Sessions Court did not consider the respondent's previous convictions; and

(iii) the Sessions Court did not consider public interest in sentencing the respondent.

This Court's Decision

"Illegal" Default Imprisonment Term

[8] Section 16 of the Act provides as follows:

> (1) The holder of a licence shall comply in every respect with the terms and conditions thereof.
>
> (2) Any holder of a licence who contravenes subsection (1) shall be guilty of an offence and shall be liable to a fine not exceeding twenty five thousand ringgit or to imprisonment for a period not exceeding two years or to both, and to a further fine of one thousand ringgit for every day that the offence is continued after a notice by the Director General requiring him to comply with such term or condition specified therein has been served upon him.

[9] Learned Deputy Public Prosecutor ("DPP") submitted that the imprisonment term in default of the fines imposed by the Sessions Court was contrary to law as the respondent was a corporate entity (as opposed to an individual). In support, learned DPP referred to the following cases: *The Coastal Bus Co Ltd v. PP* [1962] 1 LNS 199; [1962] 1 MLJ 324, *PP v. Kasihku Sdn Bhd* [1991] 2 CLJ 1192; [1991] 3 CLJ (Rep) 572; [1991] 3 MLJ 116, *Dunlop Malaysian Industries Bhd v. PP* [1984] 1 LNS 126; [1985] 1 MLJ 313 and *Edward Goh Geok Seng v. PP* [1996] 1 BLJ 45; [1995] 1 MLJU 539.

[10] It was pointed out by learned counsel for the respondent that this issue has been rendered academic as the respondent had already paid the fines.

[11] Notwithstanding that the respondent may have already paid the fines and therefore the issue of the default imprisonment term did not arise, it pays to set out the law as a reminder to the lower courts when meting out sentences in cases where the accused is a corporation.

[12] In *Dunlop Malaysia Industries Bhd v. PP, supra*, the company was charged under s. 25(1) of the Act. The factory manager of the company who represented the company at the hearing pleaded guilty to the charge. The company was fined RM10,000 and the factory manager was sentenced to one day's imprisonment.

[13] Peh Swee Chin J held that the learned Magistrate erred in construing para. 20 of the Third Schedule referred to in s. 99A of the Subordinate Courts Act 1948 in sentencing the factory manager as "he was not a defendant, neither was he charged with the offence in question and he had, unmistakably, represented the defendant/corporation in appearing in court and pleading guilty to the offence".

[14] In the present case, the charges are clearly preferred against the respondent company only. None of the officers of the respondent was charged pursuant to s. 43 of the Act which reads as follows:

> (1) Where an offence against this Act or any regulations made thereunder has been committed by a company, firm, society or other body of persons, any person who at the time of the commission of the offence was a director, chief executive officer, manager, or other similar officer or a partner of the company, firm, society or other body of persons or was purporting to act in such capacity shall be deemed to be guilty of that offence unless he proves that the offence was committed without his consent or connivance and that he had exercised all such diligence as to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances.
>
> (2) Whenever it is proved to the satisfaction of the court that a contravention of the provisions of this Act or any regulations made thereunder has been committed by any clerk, servant or agent when acting in the course of his employment the principal shall also be held liable for such contravention and to the penalty provided thereof unless he proves to the satisfaction of the court that the same was committed without his knowledge or consent or that he had exercised all such diligence as to prevent the same and to ensure the observance of such provisions:
>
> > Provided that nothing in this section shall be deemed to exempt such clerk, servant or agent from liability in respect of any penalty provided by this Act or regulations made thereunder for any contravention proved to have been committed by him.

[15] The representative of the respondent who appeared before the Sessions Court and who pleaded guilty to the charges on behalf of the respondent was not jointly charged for the offences. There would not have been any legal basis for the default imprisonment sentence to be carried out in the event the fines were not paid by the respondent. As such, I agree with the contentions by learned DPP that the Sessions Court erred when it purported to impose the default sentences.

Previous Convictions

[16] The prosecution had, before the Sessions Court, tendered a written submission in support of a heavier sentence. It attached a "Lampiran A" listing the respondent's six previous convictions in October 2003, November

2006, November 2007, May 2008, March 2014 and May 2015 for offences under ss. 25(1) and 16(1) of the Act – see exh. "P15" (at pp. 1-4 of vol. 4, record of appeal).

[17] However, as pointed out by the learned DPP, the Sessions Court did not appear to take these into consideration when imposing the sentence. There was no mention of the respondent's previous convictions in the Sessions Court's grounds of decision.

[18] Learned counsel for the respondent did not dispute these previous convictions but contended that the respondent had through its representative informed the court the steps it had taken to comply with the terms and conditions of its licence but despite having spent RM6 million, was still unable to and had thus, on 7 June 2019, engaged a consultant to apply to the Department of Environment to enhance their system further.

[19] Augustine Paul J (as he then was) in *Soosainathan v. PP* [2001] 6 CLJ 44; [2001] 2 MLJ 377 laid down the principles to be applied when considering the previous convictions of an accused. His Lordship stated:

> (1) Previous convictions are relevant in two ways. Firstly, they defeat any claim or inference that the accused is a first offender, or is of prior good character, for the purpose of any general plea in mitigation. Secondly, they may satisfy the statutory requirement of a relevant previous conviction for the purpose of subjecting the accused to increased penalties allocated for second or subsequent offences. In the absence of statutory directions to the contrary, there is no principle of sentencing that demands increasingly more severe sanctions to be administered to persons who persist in their criminality.
>
> (2) The antecedent criminal history of an offender is a factor which may be taken into account in determining the sentence to be imposed, but it cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the current offence. Not every previous conviction is considered relevant in the sentencing process. Previous offences that are significantly different from the current offence, or are regarded as uncharacteristic of the accused, may be given little or no weight unless, overall, the disparate offences reveal a profound contempt for the law and a deliberate desire to enrich oneself by deliberately embarking on a course of criminality.
>
> (3) Similarly, a gap between previous conviction and the current offence will be viewed at less seriously. The longer the gap between a previous conviction and the current offence the greater the mitigatory effect. The determinative factor in treating a person with previous convictions as a man of previous good character is not so much the time that has lapsed since the last conviction but the positive steps that he has taken to rehabilitate himself.

[20] Guidance may also be had in *PP v. Jafa Daud* [1981] 1 LNS 28; [1981] 1 MLJ 315, wherein the court held that:

> Where the convicted person has previous records and admits them as correct, the court must consider whether the offence or offences committed previously were of similar nature as the one with which he is presently charged. The court must then consider the sentences imposed in the previous convictions for similar offences to determine whether they have had any deterrent effect on him. Where he is found to be a persistent offender for a similar type of offences, then it is in the interest of justice that a deterrent sentence should be passed, and in such a case, unless there are exceptional circumstances, the quantity, nature or value of the subject-matter of the offence with which he is currently charged can very rarely constitute a mitigating factor.

[21] Out of the respondent's six previous convictions, five of them were all under s. 16(1) of the Act, the same of which the current charges are framed. The last two of these were in the years 2014 and 2016. In fact, the Sessions Court had imposed the maximum fine of RM25,000 in the case no. SDK-63ES-7/6-2016 (see p. 4 of exh.t "P15").

[22] Although the respondent's last previous conviction was in 2016, some three years before the present offences were committed, in my view, the gap between then and the present conviction does not operate as a mitigating factor. As stated by Augustine Paul J in *Soosainathan v. Public Prosecutor*, the determinative factor in treating a person with previous convictions as a man of previous good character is not so much the time that has lapsed since the last conviction but the positive steps that he has taken to rehabilitate himself.

[23] Applying those principles here, I find that there is no evidence that the respondent had taken any steps after its last conviction in 2016 to avoid committing the same offences again. There was nothing produced before the Sessions Court and in the record of appeal to support the submission by the respondent's representative in mitigation that it had engaged a consultant on 7 June 2019 to enhance their system further. In any event, even if the same could be accepted as the truth, if at all the steps were only taken after the respondent was charged with the present offences.

Public Interest

[24] The following statement by the court in the *locus classicus* case of *R v. Kenneth John Ball* (1951) 35 Cr App R 164 serves as a useful guideline in assessing as to what appropriate sentence should be meted out:

> ... In deciding the appropriate sentence a Court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who

> might be tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to the honest life. The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the court to decide what is, within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime, but in regard to each criminal, the court has the right and the duty to decide whether to be lenient or severe …

[25] Learned DPP has submitted that the Sessions Court erred in failing to properly consider public interest when sentencing the respondent. Indeed, it would appear from my reading of the grounds of decision of the Sessions Court that while the public interest factor was briefly noted, there was nothing much said about how the sentences imposed would serve public interest in the present case. It would further appear that the learned Sessions Court Judge had placed more weight on the effect of the respondent's guilty plea to saving the court's time and the expense of a full trial.

[26] It has been said that public interest is a variable that is determined by the time, place, nature and circumstances of each case including the prevalence of the offence involved and that what may be of public interest in one place may differ from another – see *New Tuck Shen v. PP* [1982] CLJ 38B; [1982] CLJ (Rep) 606; [1982] 1 MLJ 27.

[27] I will add another factor to this list. To my mind, in considering whether public interest is served by the sentence to be imposed, the court cannot but must have regard to the objective of the relevant statutory provision. For it is only when this is done that one can truly say whether the public interest which is reflected in the objective of the said statutory provision is really given a consideration to.

[28] The preamble to the Act states that it is:

> An Act relating to the prevention, abatement, control of pollution and enhancement of the environment, and for purposes connected therewith.

[29] It therefore goes without saying that it will not be in the interest of the public for a sentence to be meted which does not promote any of these objectives. As noted earlier, the Sessions Court did not seem to have taken this into account when imposing the sentence.

[30] Relevant to the issue of public interest is the prosecution's reference to the SSM search (exh. "P12") on the respondent which amongst others showed that the company had earned a revenue of nearly RM200 million in the financial year of 2018. I am of the considered view that the court is

entitled to consider this factor as against the respondent. It is grossly affront to public interest if corporations such as the respondent are allowed to flaunt and disregard the social costs caused by the pollutions only to ensure maximum profits for themselves.

[31] If it has not been said before, it is high time for all stakeholders to take environmental issues seriously. Pollutions howsoever caused not only has a negative effect on the planet but also on the people and society as a whole. As one of these stakeholders, the court is under a duty to ensure that the seriousness of the offence and its effect be reflected in the sentence it imposes.

Mitigating Factors

[32] This fact that the respondent had pleaded guilty does not automatically mean that it should entitle the respondent to a discount as of right. This court notes that in all of the other six previous convictions, the respondent had pleaded guilty and except for the conviction in 2016, received discounts in the sentences imposed. It would not be too farfetched to opine that if the respondent had learned anything from past experiences, it was that it is more "cost-effective" for them to plead guilty. After all, by the words of the respondent's own representative, the respondent had spent RM6 million on their system. When juxtaposed against the maximum fine of a mere RM25,000, it is easy to see which option was more attractive to the respondent.

[33] The fact that it was only after the present convictions that the respondent had purportedly taken the steps to upgrade its system shows that the company hesitated to take matters seriously as to do so involved having to expend millions of ringgit. There was no reason why the upgrade could not have been done even earlier on when the respondent was convicted of the same offences in 2014 and again in 2016.

Decision

[34] While it is trite law that an appellate court should be slow in interfering with a lower's court's discretion on sentencing, the court may do so in appropriate circumstances – see for instance, *PP v. Ng Chong Wan* [1988] 2 CLJ 833; [1988] 2 CLJ (Rep) 278 and *Gek Sing Kaliappan v. PP* [1999] 4 CLJ 292.

[35] It is also trite law that an appellate court should be slow to interfere or disturb with a sentence passed by the court below unless it is manifestly wrong in the sense of being illegal or of being unsuitable to the proved facts and circumstances. The mere fact that another court might pass a different sentence provides no reason for the appellate court to interfere if the court below applies the correct principles in the assessment of the sentence – see *Amir Hassan Ali Usin v. PP* [2019] 3 CLJ 325.

[36] For the reasons discussed above, I am of the view that the present case justifies such interference by this court.

[37] It is provided under s. 316(b) of the Criminal Procedure Code ("CPC") that:

> At the hearing of the appeal the Judge may, if he considers there is no sufficient ground for interfering, dismiss the appeal, or may:
>
> (b) In an appeal from a conviction or in an appeal as to sentence:
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> (i) reverse the finding and sentence and acquit or discharge the accused, or order him to be retried; or
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> (ii) alter the finding, maintaining the sentence, or with or without altering the finding reduce or enhance the sentence or alter the nature of the sentence;

[38] In the circumstances and in the exercise of this court's powers under s. 316 of the CPC, I allow the appeal by the prosecution and vary the sentence imposed by the Sessions Court as follows:

First charge:

The fine of RM13,000 is varied to the sum of RM25,000 and the default sentence of five months imprisonment is vacated.

Second charge:

The fine of RM15,000 is varied to the sum of RM25,000 and the default sentence of six months imprisonment is vacated.

[39] I so order.